Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ZHANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Duke Danquah, OLSA
Bart Willemsen, OSLA

Counsel for respondent:
Steven Margetts, ALU
Josianne Muc, ALU

Introduction

1. The applicant in this case is contesting what she alleges to be a "reassignment" or "transfer" to the Department of General Assembly and Conference Management (DGACM), communicated to her on 9 February 2009 (2009 Return to DGACM), as well as a medical evaluation dated 13 March 2009 (MSD Evaluation), on the basis that both actions were motivated by management's alleged retaliation against her over a number of years. She prays for: transfer to a post outside of DGACM at a level that recognizes her qualifications, or in the alternative a full salary until her retirement in October 2013; access to her medical file and a correction of the MSD Evaluation; disciplinary action to be taken against her current retaliators; and moral damages and legal costs. In order to attempt to prove her allegations, the

which the applicant alleges to have been a sexual assault. She states that on the advice of the medical officer to whom she reported the alleged assault, she also reported the matter on the same day to the Assistant Secretary-General (ASG) and the Director of the Department in two memoranda. It was also reported to the Chief of the Executive Office of the Department. The applicant's memoranda alleged that the Section Chief had shouted at her and pushed her in a violent manner. She thereafter requested the assistance of the department to "put your immediate attention on this matter and I do need a protection from a violence attempt from my Section Chief [sic]".

5. The (then) Administrative Officer testified at the hearing that the applicant and the accused Section Chief were both interviewed some days after the incident. A subsequently produced note to file suggests that the two were interviewed on 15 September 1997. This note also states that "[t]he details of what [the applicant] related to [the Administrative Officer] are all contained in the memoranda [of 10 September 1997]". The note then refers to a second meeting between the applicant, the Administrative Officer and the Chief on the same day, at which the same iterations were made by the applicant. In her testimony, the applicant however denied knowledge or recollection of any meeting or interview in relation to the incident.

6. The note of 15 September 1997 also states that, at the second meeting—

> When asked what course she wanted taken concerning her allegation, [the applicant] replied that all she wanted was to bring the "facts" to the Executive Office's attention.

The note suggests that a further meeting was to be held

7. On the dates 11–12 and 15–16 September 1997, the applicant took sick leave which she says was due to the alleged assault. It was the reporting of this alleged assault that the applicant says motivated and generated a number of alleged retaliatory decisions taken against her, including those the subject of the present application.

8. From 27 July 1998 to May 1999, the applicant took special leave without pay (SLWOP) from DGACM during which time she undertook graduate studies. On 22 January 1999 (whilst on leave), the applicant was ordered to pay USD2,854.43 for an "SPA overpayment from 1 August 1997 through 31 July 1998" and "Salary overpayment from 28 through 31 July 1998" as well as for a "Mid-month advance for August 1998".

9. The applicant returned to work at DGACM in May 1999 and was assigned to work in what she alleges was a "printing shop", before being reassigned to work at the Office of Disarmament and Decolonization branch of DGACM on 1 July 1999. Her performance, respectively from 1 November 1997 to 27 July 1998 (excluding her study break between 27 July 1998 and 23 May 1999), and then from 1 July 1999 to 2 December 1999 was "appraised" via two separate one-page letters from the Chief of each section.

10. Between December 1999 and April 2001, the applicant applied for five UN jobs, but was not short-listed or interviewed for any of them.

11. From 2001 to 2006, the applicant was assigned to work on ECOSOC's Repertory Report at a G-6 level. It was stated by her and uncontested that this was due to the exceptional intervention of the newly appointed Under-Secretary-General (USG) of DGACM in August 2001 in an effort to assist her.

12. In February 2006, through an *ad hoc* arrangement, the applicant worked for a period of one year with the UN System Influenza Coordinator (UNSIC), within the UN Development Group. By letter dated 8 February 2006, the Coordinator of UNSIC wrote to the USG of DGACM, referring to the "kind offer to loan this office

the services of [the applicant] for a period of one year starting in January 2006". This letter requested that the applicant be physically based in DGACM "for the immediate future", due to space limitations at UNSIC.

13. On 13 February 2006, the Officer-in-Charge, Executive Office, DGACM, prepared a "Clearance for Separating Staff Members" to be issued to the Clearance Officers for various administrative sections, noting that the applicant would be leaving the Organization on 28 February 2006, as she was assigned to UNSIC. It does not appear the applicant ever separated.

14. In an email of 24 March 2006 between UNDP managers (administering UNSIC) it was stated that "[the applicant] should be employed on ALD [an appointment of limited duration], but somehow we need to charge her G6 post [at DGACM]".

15. Starting 1 March 2007, following another *ad hoc* arrangement from DGACM, the applicant was assigned to the Department of Economic and Social Affairs (DESA) on a non-reimbursable loaned basis for a period of six months, which was extended until 31 October 2007.

16. From 1 November 2007 to 6 April 2008, the applicant returned to the ECOSOC Affairs Branch of DGACM. On 7 November 2007, the Medical Services Division wrote to the Executive Officer, DGACM, stating that "[d]ue to an ongoing medical condition, [the applicant] cannot at present perform duties involving the use of a computer for more than a total of 2 hours a day. She also cannot lift anything heavier than 3lbs". It was noted that the applicant's injury to her hand and resulting condition would be reassessed three months from that time.

17. On 28 November 2007, the Administrative Officer, Executive Office, DGACM, wrote to the applicant, stating—

> Further to your sick leave status, please note that we have contacted the Medical Services Division (MSD) regarding your absence on **full**

> As you are aware, your temporary assignment to DESA is set to expire this week. Both DGACM and DESA have made an extended accommodation for you during your recent period of illness, and we hope that you have had the chance to recover from your injury. This arrangement cannot continue indefinitely, and you will be expected to return to DGACM to resume your duties with GAEAD. Please proceed to the Medical Service prior to your return.

21. The applicant responded by email two days later, requesting a job description of the proposed position she would take at DGACM, and reminded the Executive Officer of her medical restrictions.

22. On 12 February 2009, the applicant attended a consultation at the Medical Services Division, at which she agreed to undergo a voluntary independent occupational medical evaluation for functional capability on 6 March 2009. The applicant's case was referred to a certified independent medical evaluator specialising in the medical condition afflicting the applicant (Independent External Doctor), from the Mount Sinai-Irving J. Selikof Center for Occupational and Environmental Medicine.

23. Also on 12 February 2009, the Executive Officer of DGACM asked the applicant to make an appointment to discuss her proposed assignment and job description, which she believed "is very much in line with the work you are interested in". From the subsequent exchange, the meeting with the Executive Officer appeared to take place that day, during which job descriptions for a Meeting Servicess Assistant and a Programme Assistant were discussed. On the same date, and apparently after the meeting, on 12 February 2009, the applicant reported what she alleged to be retaliation against her by the Executive Officer to the Ethics Office; this retaliation allegedly being motivated by her reporting the incident of 10 September 1997.

of 13 March 2009, and the 16 March 2009 Return to DGACM. By letter dated 21 May 2009, the applicant was advised of the outcome of her request for review. She filed an appeal with the JAB on 11 June 2009.

27. On 5 June 2009, the Chief of the applicant's current office allegedly informed her that her position at that time was only a three-month assignment which would end at the end of July 2009, although I note that the applicant still appeared to be working in that or another position in DGACM at the time of the hearing in January 2010.

28. On 5 October 2009, the Ethics Office found that there was no prima facie case of retaliation against the applicant. On 24 June 2009 the applicant submitted an appeal to the JAB, which was transferred to the Dispute Tribunal on 1 July 2009. The respondent's reply was submitted on 26 August 2009. A directions hearing was held on 12 November 2009 at which various procedural orders were made. These having been complied with, there was a hearing on the merits held over an entire day on 28 January 2010. The Tribunal heard 3 witnesses for the applicant, being herself, a former supervisor and a representative from the UN Focal Point for Women; together with three witnesses for the respondent, being the Administrative Officer at the time of the alleged 1997 assault, the relevant Doctor from the UN Medical Services Division and the Executive Officer from DGACM. At this hearing I granted the parties leave to file final written submissions on matters arising, which both parties did in compliance with deadlines which were extended on one occasion. In correspondence subsequent to the hearing, and without the sanction of her Counsel, the applicant sought to allege, ostensibly to introduce further documentation, that the hearing was a directions hearing and not a final hearing on the merits. The applicant's Counsel, apparently having spent two days consulting with the applicant prior to the hearing, correctly in my view, conceded in a follow-up e-mail to the Registry that the hearing of 28 January 2010 was indeed a final hearing on the merits.

Applicant's submissions

29. The applicant submits that the impugned decisions are retaliatory in their nature, are contrary to the Organization's rules and policies, are tainted by procedural

transfer out of DGACM because of the ongoing retaliation and harassment, the Executive Officer's response was, "Why don't you quit the UN?" Thus, she alleges the 2009 Return to DGACM was further evidence of this pattern of retaliation.

MSD Evaluation

33. The applicant contends that arranging an independent medical assessment on 12 February 2009 was merely a pretext to force her into a marginalized position within the Organization. For this assessment, DGACM provided a job description of a Meeting Services Assistant, G-6, to the Medical Service to serve as a basis for the external medical evaluation, which was different to the job description for the position of Program Assistant provided to the applicant. She asserts that the medical evaluations and treatment overall sought to have her labeled as "disabled" in order to minimise her potential to transfer to another department.

34. The applicant alleges that the medical evaluation failed to take into account her actual condition and ordered unjustified restrictions that limit her career possibilities within the Organization and relegate her to menial and demeaning tasks which do not give due regard to her post-graduate qualifications and experience.

35. Further, the Medical Services Division's attempt to have her meet with a psychiatrist was unrelated to the issues the applicant has with her hand and was thus demeaning and an attempt to label her as mentally unstable in order to ensure that she is unable to obtain a position within another department.

36.

assignment for another year at DESA, or consideration for any post in DESA. In his response the USG indicated that the—

> [S]ix month assignment with the S

47. The applicant's condition was evaluated in March 2009 by the Independent External Doctor, who made recommendations for restrictions to generally limit the risk posed to the applicant's injury in her day-to-day tasks. The respondent further contends that the medical evaluation was in line with ST/AI/2005/12 (Medical clearances and examinations) which provides in paragraph 1.3 that "[m]edical fitness of candidates for employment and staff members is determined by reference to their

incidents which the applicant says constitute a pattern of retaliation do not in any

UNSIC's request that the applicant remain physically at DGACM during this assignment. In this regard, in her memorandum of 8 August 2008 to the USG of DGACM, the applicant requested an extension of the *ad hoc* arrangement with DESA on the basis that her medical condition prevented her from performing the duties of a Meetings Services Assistant. In order to comply with her medical restrictions, since her return to DGACM on 16 March 2009, she has been assigned to the position of Programme Assistant.

Considerations and findings

54. In this matter I have had the benefit of substantial submissions prior to the hearing on the merits. At the hearing, I then had the further benefit of the appearance of three witnesses from either side, including the applicant herself. Thereafter, as noted above, the parties filed further submissions with my leave, which I have considered, including the subsequent documents filed by the applicant.

Receivability

55. Although I was not addressed specifically on the question of receivability, I do find it to be an issue for the applicant. Recent jurisprudence of the Tribunal has tended towards a wider definition of what constitutes an "administrative decision" for the purposes of art 2.1(a) of the Statute of the Tribunal than that previously applied by the UN Administrative Tribunal, as outlined in *Andronov* (2004) UN Administrative Tribunal 1157—cf. *Luvai* UNDT/2009/074; *Wasserstrom* UNDT Order No. 19 (NY/2010). Without deciding what the appropriate test is, an administrative decision must clearly at the very least require a decision to be taken by or on behalf of the Organization in the course of managing its affairs and it is not apparent that the matters the applicant contests satisfy even an expanded definition of what constitutes an administrative decision. The first alleged decision, involving the 2009 Return to DGACM communicated on 9 February 2009, seems to me to be a confirmation of an existing arrangement, coupled with a request that the applicant undergo a medical evaluation. While arguably administrative in nature, the said

communication does not, aside from perhaps the requirement that the applicant undergo an evaluation (which is not challenged) result in a determination or new action and to my mind does not contain a decision over which the Tribunal has jurisdiction. In any event, if the applicant had wished to challenge the decision which preceded the 2009 Return to DGACM, she should have done so at the time she was informed that her second *ad hoc* assignment was only temporary in nature. She failed to do so and indeed, accepted the temporary nature of the assignment. In any event, she would have been well out of time (at the time of filing her application) to challenge the original decision and has not put forth any exceptional case warranting extension or waiver of the Tribunal's time limits.

56. It is also doubtful that the MSD Evaluation constituted an administrative decision. This evaluation which was voluntarily attended by the applicant resulted in a series of recommendations which the applicant was entitled to waive in writing. If she was dissatisfied with the outcomes, she could have sought review of them via other avenues. Again, were there to have been any administrative decision, it would have been subsequent to the MSD Evaluation (such as, for example, finding that the applicant was unable to perform a specific task or role), but this is not the nature of the application before me. The various events which occurred prior to 2009 certainly contained a number of administrative decisions, but as I have described, these are not presently before me except insofar as they inform the impugned decisions.

57. Accordingly, I find that the application is not receivable. However, in the interests of justice, as indicated earlier in this judgment, I have decided to undertake a final review of the applicant's complete allegations in this matter.

Consideration of merits

58. The respondent at all times objected to the introduction of evidence or claims which it considered irrelevant or otherwise inadmissible, on the basis that they related to events which were peripherally related, at best, to the impugned administrative decisions. Indeed, prior to the commencement of the hearing, the respondent moved

a Motion to Strike based on grounds (a) to (d) in paragraph 50 above. Whilst I found that the respondent's motion was not entirely devoid of merit, it was my view that the allegations of retaliation in relation to the alleged sexual assault may be prima facie relevant as they go to the heart of the applicant's case on its merits; i.e. that the alleged improper motivation taints the administrative decisions. As the matter had been set down for one day only, I preferred not to deal with the issue piecemeal. I therefore placed on record the respondent's objections and submissions on admissibility for my consideration, and found that it was for the applicant during the proceedings to persuade the Tribunal of the relevancy or otherwise of the matters in dispute. While noting the respondent's objections, I entertained to take the applicant's case at its best—that is, to assume that the impugned decisions might have had motivations of retaliation, which retaliation had been continuing for some twelve or more years—and to examine the evidence relating to allegations which might otherwise be found inadmissible on various grounds.

59. I was not addressed expressly at the hearing of the matter on the standard or burden of proof in relation to any of the allegations, although in its reply the respondent stated that, in accordance with the jurisprudence of the UN Administrative Tribunal, the burden was the applicant's to bear. This case would be required to be determined upon a balance of probabilities, each party proving that which it has asserted—see *Parmar* UNDT/2010/006 and *Sefraoui* UNDT/2009/095.

60. In the submissions and at the hearing, in addition to the impugned decisions, the applicant also sought to challenge the correctness of many other events, which might be classified as administrative decisions, which have occurred since 1997. I do not believe that such events are necessarily irrelevant, as contended by the respondent, but note that they are relevant for present purposes only insofar as they bear on the actual administrative decisions challenged. In any event, aside from the fact that many of the decisions would be time-barred, requests for administrative review and management evaluation are necessary steps in the appeal process, neither of which were sought in relation to any of these decisions (cf. *Crichlow*

UNDT/2009/028; *Parmar* UNDT/2010/006), being additional reasons why a request

particular rules or regulations having been breached by the Medical Services Division or those who referred her to them, but rather alleges the motivation for the referral was improper, and thus the entire process is tainted.

65. It appears to have been reasonable, and it was not argued otherwise, that the applicant was required in February 2009 to be subjected to a medical assessment prior to her return to her functions, taking note of what all parties acknowledged as an existing medical condition. Her previous medical assessments had recommended ongoing testing and she was returning to a new role. The applicant's Executive Officer testified that DGACM, despite its size, had relatively similar functional requirements across its positions, many of which would have been difficult for the applicant, given her restrictions. It was stated that the applicant was first suggested a position on a scanning operation, but that after the applicant inspected the machine and station, this was not considered appropriate. Accordingly, another role was proposed (that of Programme Assistant) and the applicant stated that she was already performing eleven of the twelve functions of that role. Making an assessment on the basis of tasks the majority of which the applicant was already performing does not appear to have been an unreasonable course of action.

66. The Doctor (from the Medical Services Division) testified, which testimony I found to be credible, that she decided to refer the applicant to an external specialist as there seemed to be little improvement in the applicant's condition over the preceding fifteen months, despite intensive treatment, and because the Doctor's own investigations had caused her to be uncertain as to the quality of the medical treatment the applicant had received. Accordingly, the Doctor made enquiries of physicians with greater specialised knowledge and referred the applicant to an independent specialist. The Doctor found the specialist's conclusions reasonable and transmitted the recommendations to DGACM in the same language as she received them. This seems to me to have been an entirely reasonable course of action, and there is no suggestion it did not comply with the Organization's rules and regulations. Further, as the Medical Services Division and the expert to whom they referred the

marginalize her, I note that these reports respectively described her as "conscientious and highly reliable in all the assignments she undertook", that her "performance in ORES was fully satisfactory" and that she was "highly reliable in accomplish[ing] all assigned tasks successfully". These duties appear to me to be more than clerical in nature, as they would generally involve

ordering DESA not to allow the applicant to apply for internal jobs, I did not find this to have been established.

75. The applicant's claims that the Organization has not properly used its human resources, nor promoted gender equality, were premised as vague and general comments, including by the witness apparently called for establishing this evidence. These claims remain unsupported by evidence and do not impugn any specified administrative decision and therefore do not warrant further comment.

Ethics Office Report

76. Although I have already made a determination of the case independently, for the purposes of completeness I mention the report prepared by the Ethics Office after making an analysis of the same, or substantially similar, facts. ST/SGB/2005/21 deals with retaliation and the protection extended to staff members who report it. An investigation was made by the Ethics Office pursuant to this bulletin at the applicant's behest on 12 February 2009. The Ethics Office prepared a report dated 3 October 2009 based on a number of meetings with the applicant and the consideration of material relating to at least 14 alleged retaliatory acts taken by the respondent against her over approximately 12 years in the period of October 1997 to May 2009. This report found that the applicant undertook a "protected activity", that is, that she reported the failure of her former Section Chief to comply with his obligations to the Organization. I do note that the Ethics Office considered the applicant's complaint in spite of the fact that it was, on a strict interpretation of the bulletin, not obliged to, both because of the date that the bulletin came into operation, and because the act the applicant alleged the retaliation was based on had occurred more than six years before her referral of the matter to the

reached a different conclusion to that which I have. I do, however, note for the record that the Ethics Office was also unable to conclude that there was even a prima facie case of retaliation.

Conclusion

78. The applicant's case is however an unfortunate one. Without judging the nature of the incident, it is clear that an incident which occurred many years ago continues to trouble her greatly. It appears to me that it would have been beneficial for all parties had this incident been dealt with more thoroughly in the past, although that is not a matter on which I can make any binding conclusion in the circumstances. While appearing before me,rile appe oappeo8-ph989d[(o8-pg(at)]T)ebh12 9bars906 Tc -0t

(*Signed*)

Judge Memooda Ebrahim-Carstens

Dated this 25th day of February 2010

Entered in the Register on this 25th day of February 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York